Supreme Court, U.S.
JUL 18 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1256

CONNELL CONSTRUCTION COMPANY, INC.,
Petitioner,

versus

PLUMBERS AND STEAMFITTERS LOCAL UNION No. 100, etc.,
Respondent.

PETITIONER'S BRIEF ON THE MERITS ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Joseph F. Canterbury, Jr.
4050 First National Bank Building
Dallas, Texas 75202

Counsel for Petitioner

Of Counsel:
SMITH, SMITH, DUNLAP & CANTERBURY
4050 First National Bank Building
Dallas, Texas 75202
Bowen L. Florsheim
On the Brief

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PETITIONER'S BRIEF ON THE MERITS ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The findings of fact and conclusions of law in the District Court (A. 34-42) are reported at 78 LRRM 3012 (N.D. Tex. 1971). The opinion of the Court of Appeals is reported at 483 F.2d 1154 (5th Cir. 1973), and is repoduced as Appendix B (pp. B-1-B65), to the Petition for Certiorari.

JURISDICTION

The Judgment and Opinion of the Court of Appeals, with Judge Clark dissenting, was entered on August 22,

1973. Petitioner made timely Motion for rehearing *en banc*, which Motion was denied by Order of the Court of Appeals on November 19, 1973 (Pet. App. B-66). The Petition for Writ of Certiorari was filed with this Court February 14, 1974, and was granted on May 13, 1974 (A. 144). The jurisdiction of this Court is vested by 18 USC §1254(1).

FEDERAL AND STATE STATUTES INVOLVED

(Reproduced in the Appendix to this Brief)

The Federal Statutes involved are as follows:

1. Sherman Anti-Trust Act (15 USC §1);
2. Clayton Act, Sections 6 and 20 (15 USC §17 and 29 USC §52);
3. National Labor Relations Act [29 USC §151, et seq., Section 7, 8(b)(4) and 8(e)]
4. Norris-LaGuardia Act (29 USC §101, et seq., Sections 1, 2 and 4);
5. Federal Declaratory Judgment Act, (28 USC §2201).

The State Statutes involved are as follows:

1. Vernon's Texas Codes Annotated, Business and Commerce Codes, Sections 15.02, 15.03 and 15.04.

QUESTIONS PRESENTED

I.

Whether an agreement in restraint of trade between a union and a general contractor in the construction industry which requires the general contractor to refuse to do business with, and to boycott any business entity unless such entity is a party to an exclusive form of collective bargaining agreement with that union, violates the Sherman Anti-Trust Act and/or the anti-trust laws of the State of Texas in the absence of a collective bargaining relationship between such trade union and general contractor.

II.

Whether a federal court should adjudicate questions of the National Labor Relations Act when such questions arise in the context of, and are vital to, determinations of violations of the federal and/or state anti-trust laws.

III.

Whether an agreement in restraint of trade obtained from a general contractor by a union is protected by the National Labor Relations Act and/or constitutes legitimate union interest if the agreement, its procurement and maintenance, are not addressed to the labor relations of the general contractor *vis-a-vis* his own employees and/or the agreement is obtained by coercion.

STATEMENT OF THE CASE

A. Facts of Controversy.

Petitioner, hereinafter referred to as "CONNELL", is a general contractor engaged in the construction business in Dallas, Texas. CONNELL has collective bargaining agreements with various construction trade unions

which represent its craft employees (A. 53). CONNELL does not, however, and never has, employed anyone engaged in plumbing or similar work. Respondent has at all times been a "stranger union" to CONNELL and its employees. CONNELL obtains its work by negotiations or on a competitive bid basis and, in turn, selects subcontractors for plumbing and mechanical equipment, materials and labor on a competitive bid basis (A. 51). Prior to the events which resulted in this case, CONNELL had done business for many years with both union and non-union plumbing and mechanical subcontractors. (A. 53, 55).

Plumbers and Steamfitters Local Union No. 100, Respondent hereinafter referred to as "UNION", represents its members with various mechanical and plumbing firms in the North Texas area. UNION negotiated a Master Area-Wide Collective Bargaining Agreement with a multi-employer association consisting of the largest unionized plumbing and mechanical construction firms in the North Texas area in 1968 and in 1971. Article XIX of the 1968 and Article XVII of the 1971 Master Area-Wide collective bargaining agreements provide that UNION will not enter into any form of collective bargaining agreement for lesser wages or working conditions than those contained in the Master Agreement (Pl. Exs. 5A; A. 118 and 6A; A. 119).

In late 1970, UNION demanded that CONNEL enter into an agreement with it whereby CONNELL would agree not to do any business with plumbing and mechanical firms unless such firms were parties to "an executed current collective bargaining agreement" with UNION. UNION sent its proposed agreement (Pl. Ex. 3;

A. 59, 112-113)[1] to CONNELL with a letter indicating that UNION would picket CONNELL'S construction projects unless CONNELL signed the agreement within ten (10) days (Pl. Ex. 2; A. 110-112). When CONNELL failed to sign the proposed agreement, UNION commenced picketing the Bruton Venture construction project on which CONNELL was general contractor for the admitted purpose of forcing CONNELL to sign the proposed agreement, foreclosing CONNELL'S ever doing business with any plumbing or mechanical subcontractors unless they had collective bargaining agreements with UNION (A. 22, 82). UNION did not represent, nor seek to represent, a single employee of CONNELL.

At the time such picketing commenced, approximately 150 union employees of CONNELL and its various subcontractors left the jobsite, bringing to a halt all work progress (A. 61). CONNELL'S plumbing subcontractor on the picketed project had a collective bargaining agreement with UNION (A. 82). The picketing continued until a Temporary Restraining Order was issued against UNION by the 134th District Court of Dallas County, Texas on CONNELL'S Petition in that Court, alleging that the subject agreement and the picketing for same were volative of the anti-trust laws of the State of Texas (A. 3-17). UNION successfully removed the case to the United States District Court for the Northern District of Texas, alleging in its Petition for Removal that various sections of the National Labor Relations Act, hereinafter referred to as "NLRA", controlled the controversy over the subject agreement. After that Court refused to remand the case to

1 The proposed agreement is also reproduced in the Opinion of the Court of Appeals at 483 F.2d. 1156; Pet. App. B-2. As used in this brief, the terms "proposed agreement" and "subject agreement" refer to this agreement and not to a collective bargaining agreement.

State Court, CONNELL, under threat of further picketing by UNION (A. 63), entered into the agreement, under protest (Pl. Ex. 4; A. 62, 114-116).

CONNELL then amended its pleadings in the United States District Court seeking a Declaratory Judgment pursuant to 28 USC §2201, that the subject agreement with UNION violated the Sherman Anti-Trust Act, 15 USC §1, as well as the anti-trust laws of Texas (A. 25-34). UNION filed a counterclaim seeking a Declaratory Judgment that the agreement was legal and was protected by Section 8(e) of the NLRA (29 USC §158-e), (A. 24).

During the trial of the case the following additional facts were established:

1. CONNELL has, prior to entering into the subject agreement with UNION, awarded contracts for the mechanical portions of a project by competitive bids, without regard to the labor relations policy of the mechanical or plumbing firms (A. 51-54;68).

2. That on approximately 50% to 60% of the construction projects CONNELL bids, the architect specifies acceptable mechanical subcontractors for the project, usually specifying both open shop and union companies (A. 64-67).

3. That for twenty-four (24) years, CONNELL has done business on a regular and continuing basis with twelve (12) non-union

mechanical firms as well as with twelve (12) union firms (A. 55-56).

4. That CONNELL has lost construction jobs since entering into the subject agreement with UNION, and on two of those projects, Texas Distributors, a non-union firm with which CONNELL had done business for over ten (10) years (A. 68, 108), made the most competitive bids (A. 65-67).

5. That at the time of trial, UNION had sent the same or similar agreements as it sought from CONNELL to forty-five (45) other general contractors and had obtained the written agreement of five (5) other general contractors; had picketed some general contractor for a similar agreement the week before the trial (A. 77-78); and had been picketing various general contractors for the past three years to obtain an agreement similar to the one involved herein (A. 84).

6. That there was an exclusive form of collective bargaining agreement to which UNION was a party, from which UNION would not deviate, and CONNELL was restricted by the agreement (P. Ex. 4), from doing business with any mechanical company not a party to the exclusive form of collective bargaining agreement with UNION (A. 73-77).

7. That the General Counsel of the National Labor Relations Board had refused to issue a

> Complaint under the NLRA involving the same agreement entered into by KAS Construction Company prior to the time UNION picketed CONNELL for the agreement (D. Ex. 10; A. 141).

In addition to the above, counsel for CONNELL and UNION entered into Stipulations of Fact covering certain facts of the case (A. 106-110).

B. Decision of the United States District Court.

After the trial of the case before the Federal District Court, Judge Sarah T. Hughes issued Findings of Fact and Conclusions of Law on November 9, 1971 (A. 34-42), Judgment being entered in the case on November 18, 1971 (A. 43). Although Judge Hughes did not make findings on all pertinent facts, those she made are correct and are supported by the evidence. The District Judge held that the agreement in question was protected by the construction industry proviso to Section 8(e) of the NLRA and that it was therefore exempt from federal and/or state antitrust laws (A. 39-43). No decision was made by the District Court on the merits of the federal or state antitrust issues of the case.

C. Decision of the Court of Appeals.

The Court of Appeals, with Judge Clark dissenting, rendered a sixty-five (65) page opinion affirming the Judgment of the District Court (Pet.App. B-1; 483 F.2d. 1154). The majority opinion of the Court of Appeals held that the activities of UNION and the questioned agreement were immune from the federal anti-trust laws and that the anti-trust laws of the State of Texas were

preempted by federal labor law. The majority panel failed to find an illegal conspiracy on the grounds that CONNELL was the sole "non-labor" party to the questioned agreement (Pet. App. B-23). However the majority of the Court refused to decide whether the questioned agreement was violative of, or protected by, the NLRA, even though the District Court had previously found the agreement to be protected solely by Section 8(e) of the Act. The Court of Appeals acknowledged that the General Counsel of the National Labor Relations Board had refused to issue a Complaint in a case involving picketing by UNION to obtain the exact agreement from another general contractor (Pet. App. B-6 and B-45) in Dallas, Texas, and strongly urged that the National Labor Relations Board, hereinafter referred to as "NLRB", decide the labor issues of the questioned agreement at the "next available opportunity".[2] However; the Court majority refused to pass on the labor issues though they are inextricably entwined with the anti-trust questions in this case and UNION'S only defense to the anti-trust allegations of CONNELL

2 The majority of the Fifth Circuit Court stated:

> "We feel quite strongly that the Board should take and consider this issue fully at the next available opportunity. Its resolution will have significant impact on labor relations in the construction industry. Repeated attempts by an administrative body to avoid resolution of a difficult issue may constitute an abuse of discretion." (Pet.App. B-40)

The General Counsel for the NLRB continued to refuse to issue Complaints in three cases pending with him involving identical agreements prior to the Fifth Circuit's opinion and in one filed with the NLRB since the Court's decision. Since the filing of the Petition for Certiorari herein, he has issued a twenty-three page decision refusing to issue Complaints in these cases arising under the NLRA over similar agreements, thereby foreclosing the possibility of the NLRB deciding the 8(e) proviso question left open by the majority opinion of the Court of Appeals as discussed *infra*. *Ponsford Bros.*, NLRB Case Nos. 28-CC-417, 28-CC-431, 28 CE-12; *Hagler Construction Co.*, 16-CC-447; *Howard U. Freeman, Inc.*, 16-CC-472 and 477; *Columbus Building and Construction Trades Council*, 9-CC-706-1 through -20.

has been the construction industry proviso to Section 8(e) of the NLRA.

SUMMARY OF ARGUMENT

This case involves violations of the Sherman Act by UNION'S forcing CONNELL to boycott and refuse to do business with any plumbing or mechanical firms which do not have collective bargaining agreements with it. UNION will enter into only one form of collective bargaining agreement, being the exact agreement it entered into with a multi-employer association consisting of the largest unionized mechanical and plumbing contractors within the relevant market area. The form is different, but the results of the subject agreement are the same as those previously condemned by this Court under the Sherman Act. The subject agreement restricts competition, artifically inflates construction costs, and restricts trade in interstate commerce. There is no work preservation or other legitimate labor interests involved in the subject agreement, and there is no collective bargaining relationship between CONNELL and UNION.

The subject agreement is the result of "conspiracy" or "combination" between CONNELL and UNION to restrain trade. The effects of the agreement make a mockery of the NLRA to the point that it represents no "legitimate labor interest", therefore, UNION is not immune from the proscriptions of the Sherman Act herein.

UNION'S sole defense to the anti-trust allegations of CONNELL has been that the construction industry proviso to Section 8(e) of the NLRA protects both the

agreement and UNION'S coercion of CONNELL to obtain it. The legislative history to the §8(e) proviso clearly reveals that Congress only intended to allow voluntary agreements and those made within the collective bargaining framework. The Court of Appeals refused to decide any of the labor law questions involved in this case, including the reach of the §8(e) proviso. The NLRB General Counsel has consistently refused to process charges of NLRA violations involving the subject agreement.

Neither the Court of Appeals nor the Federal District Court considered the State Anti-Trust issues involved in this case, both of them routinely applying the Preemption Doctrine. The subject agreement between UNION and CONNELL violates the Texas Anti-Trust Laws as well as the Sherman Act.

The proper decision in this case requires a balancing of the federal anti-trust policy, favoring competition, with the federal labor policy, which protects the rights of employees to engage in or refrain from union activities and the rights of employers to be free from disputes not their own. Also, the methodical application of the Federal Preemption Doctrine should be closely examined herein.

Finally, the Court should hold that federal courts have jurisdiction to decide labor law questions arising in anti-trust cases, especially when no relief can be obtained from the NLRB.

It is respectfully suggested, as shown in the following Argument, that this Court should find the subject agreement and UNION'S actions in obtaining it are violative

of both the Sherman Act and the anti-trust laws of Texas, and that it is not protected by the Construction industry proviso to §8(e) of the NLRA.

ARGUMENT

I.

THE SUBJECT AGREEMENT AND UNION'S ATTEMPTS TO OBTAIN SAME ARE VIOLATIVE OF THE SHERMAN ANTI-TRUST ACT

A. Introduction.

Prior to forcing CONNELL to agree to refuse to do business with any plumbing and mechanical firms unless they had a collective bargaining agreement with UNION, the local multi-employer group of mechanical contractors and UNION entered into a Master Area Collective Bargaining Agreement whereby UNION agreed to impose the same wage scale and working conditions on all other mechanical firms.[3] UNION then went completely outside of any collective bargaining framework and forced CONNELL to agree to refuse to do business with any mechanical or plumbing firms other than the favored employers who were parties to the Master Area Agree-

3 Article XIX of the Master Collective Bargaining Agreement (A. 118) provides as follows:

> "The Union further agrees that during the life of this Agreement that it will not grant or enter into any arrangement or understanding with any other employer *which provides for any wages less than stipulated in this Agreement* as the minimum wages *or for work under any more favorable terms or conditions* to the employer than are expressed or implied in this Agreement *for less than the rate of wages indicated in this Agreement.*" (emphasis added).

At the time of trial herein, UNION had negotiated another Master Agreement containing identical language in Article XVII (A. 119).

ment or those who would adopt it, if the UNION would allow them to do so. While under examination by counsel for CONNELL, the UNION'S Business Manager, Mr. Patterson, made it clear that the only plumbing contractors a general contractor such as CONNELL could do business with if he were a party to the subject agreement were those who executed the Master Area Agreement between UNION and the Mechanical Contractors Association:

> "Q. (By Mr. Canterbury) What is the Plaintiff's Exhibit 5(a), Sir?
>
> A. (By Mr. Patterson) This is an expired agreement between Local Union 100 and Mechanical Contractors Association of Dallas.
>
> Q. Is that the agreement that you had in force with mechanical contractors in the Dallas area at the time you sent the proposed contract which is the subject of this lawsuit to Connell Construction Company?
>
> A. This is the agreement.
>
> Q. Is that the agreement you are referring to when you say in your agreement that: 'Whoever the contractor may be shall not subcontract work to anybody who doesn't have an agreement with Local 100.' Is that the one you are referring to?

A. Yes, this is the one I refer to.

Q. Do you have — would there be any other agreement?

A. None other.

Q. Well, could a — suppose a subcontractor, mechanical contractor, wanted to get a contract. At the time could they come in and get different terms?

* * * * *

A. No. The agreement says that no one will be given a more favorable agreement. I couldn't if I desired, as an agent, sign an agreement other than the ones in existence between the local contractors and Local 100.

Q. I see. So that's — in other words, once you sign that contract with the Mechanical Contractors Association, that sets the only type of agreement which your Union can enter into with any other mechanical contractors, is that correct, sir?

A. That is true." (A. 73-74).

Since the commencement of this case, UNION has entered into a new collective bargaining agreement with a different multi-employer group, North Texas Contrac-

tors Association; however, UNION still would not grant a different collective bargaining agreement to any plumbing mechanical firm because of the "favored nations clause" contained in Paragraph XVII of the new Master Area Agreement (A. 74-77). This type of collective bargaining has been condemned by this Court in *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), and in *Ramsey v. United Mine Workers*, 401 U.S. 302 (1971). In *Pennington*, this Court said:

> "(W)e think a union forfeits its exemption from the anti-trust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy. *This is true even though the union's part in the scheme is an undertaking to secure the same wages, hours, or other conditions of employment from the remaining employers in the industry.*" Id. 665-666 (emphasis added).

> "(T)here is nothing in the labor policy indicating that the union and the employers in one bargaining unit are free to bargain about the wages, hours and working conditions of other bargaining units or to attempt to settle these matters for the entire industry. On the contrary, the duty to bargain, unit by unit, leads to a quite different conclusion. The unions' obligation to its members would seem best served if the union retained the ability to respond to each bargaining situation as the individual circumstances

might warrant, without being strait-jacketed by some prior agreement with the favored employers." Id. at 666.

UNION had no labor dispute with CONNELL. It was admitted that the mechanical subcontrator on the project which UNION picketed to obtain the subject agreement was a Union contractor (A. 82). UNION's Business Manager testified that he was not even aware of the fact that CONNELL had done business with open shop mechanical firms in the past, but that he only wanted CONNELL to refuse to do business with any companies that do not have an agreement with UNION:

"Q. (By Mr. Canterbury) Mr. Patterson, in proposing this contract to Connell Construction Company, prior to the time you proposed it, were you aware of the fact that Connell did business with numerous open shop mechanical firms?

A. (Mr. Patterson) I wasn't aware of their total labor policy. I don't know how many open shop firms, mechanical, electrical, or otherwise, that they do business with.

Q. Did you know they did business with any open shop mechanical firms?

A. No, not to my knowledge at the time, I did not. At the time I proposed this, I had already, as I stated, proposed such an agreement to other mechanical — to other general contractors. No.

Q. When you started — when Local 100 started picketing on the Bruton Venture project, did not Connell have a union mechanical contractor on that job?

A. Yes, they had a union contractor, Dallas Air Conditioning.

Q. And the purpose of the picketing, it has been stipulated, was to get Mr. Connell to sign this agreement, correct?

A. This is correct.

Q. And you wanted Mr. Connell to not do business with any company that doesn't have a contract with Local 100?

A. That is what the proposed agreement states and what my cover letter also asks. (A. 82-83).

If this Court will compare the agreement (Pl. Ex. 2) and its effects with Section 1 of the Sherman Act, it will be found that the agreement reveals a violation on its face; that it is, in fact, a contract in restraint of trade, and that, by entering into such agreement, a union and an employer have conspired and combined to restrain trade in the construction industry. It was stipulated at the trial of this case that CONNELL was engaged in interstate commerce, or in a business affecting interstate commerce (A. 107). By entering into this agreement, CONNELL has become an extension of, or a vehicle for, UNION's extending its Master Area Agreement to lock up the construction market within its geographical jurisdiction,

which extends from Dallas, Texas, to the Oklahoma border (A. 72), for the benefit of the "favored employers" who have adopted UNION's Master Area Agreement.

The anti-competitive effects of the subject agreement are not only damaging to CONNELL, but to the mechanical and plumbing firms with whom CONNELL and the other general contractors who have entered into the agreement with UNION must boycott and refuse to do business. UNION has complete control over whom CONNELL, and all other general contractors from whom it has or can force a similar agreement, may do business. Since the Master Area Agreement is the "key" for a mechanical contractor to enter or remain in the construction market controlled by UNION and the favored employers, competition is lessened, construction costs are inflated, and a monoply is achieved by UNION and the favored employers through general contractors for the benefit of those mechanical contractors who hold or can obtain the "key" from UNION.

If a mechanical contractor's employees do not want to be represented by UNION; if they wish to belong to another union, or simply wish to exercise the right, presumably granted them by Section 7 of the NLRA, to refrain from belonging to any union, both they and their employer is cut out of the construction market. UNION is achieving results much broader than those condemned in *Pennington* and *Ramsey*, supra, with the enforced aid of CONNELL and others with whom it has no legal right to bargain, and is forcing all mechanical and plumbing firms out of the market unless they adopt the Master Agreement and require their employees to join UNION.

UNION'S scheme makes a mockery of the NLRA, but the NLRB is powerless to attack it because Complaints are dismissed by the General Counsel. UNION slides around the valid state anti-trust laws on a preemption theory that has been routinely applied and has, so far, escaped the Sherman Act proscriptions on a misplaced immunity theory. The question of whether or not UNION has violated the Sherman Act turns on the correct interpretation of the extent to which unions are exempt from federal anti-trust laws.

B. UNION'S Actions Herein Are Not Exempt From the Anti-Trust Laws.

1. History of Labor Exemption and Its Limitations

In 1908 this Court held that unions were subject to the Sherman Act. *Loewe v. Lawlor*, (commonly referred to as the *Danbury Hatters Case*), 208 U.S. 274 (1908). In 1914 Congress granted labor exemptions from the anti-trust laws in Sections 6 and 20 of the Clayton Act (15 USC §17 and 29 USC §52); however, those exemptions only apply to unions representing employees *vis-a-vis* their own employer — not to secondary actions that affect the market for goods and services. *Duplex Printing Press Co. v. Deering*, 254 U.S. 433 (1921); *Bedford Cut Stone v. Journeymen Stonecutters Ass'n*, 274 U.S. 37 (1927), and *United Mine Workers v. Coronado Coal Co.*, 268 U.S. 295 (1925). Congress responded to these cases by enacting the Norris-LaGuardia Act in 1932 (29 USC §101-§115); however, this Act granted no substantive exemptions, but only placed restrictions on the authority of federal courts to issue injunctions and restraining orders against labor unions.

In 1935 Congress enacted major labor law legislation in the Wagner Act, but did not condemn secondary boycotts.

The next major anti-trust-labor case was this Court's decision in *Apex Hosiery v. Leader*, 310 U.S. 469 (1940), wherein a primary labor dispute was held exempt from the anti-trust laws by balancing the dispute with the labor policy of the Clayton and Norris-LaGuardia Acts. The next year came *U.S. v. Hutcheson*, 312 U.S. 219 (1941), which involved a jurisdictional dispute that caused the losing union to institute a secondary boycott. The Court extended union's labor exemptions from injunctions granted by the Norris-LaGuardia Act to the status of substantive exemptions, and held the secondary boycott of *Hutcheson* immune from the anti-trust laws. In spite of the error of creating substantive exemptions out of the Norris-LaGuardia Act, the Court did balance federal labor policy, as it then existed, with federal anti-trust policy. Unions' abuses of their anti-trust immunity reached a climax in *Hunt v. Crumboch*, 325 U.S. 821 (1945), causing Justice Jackson to write a dissenting opinion in which he stated:

> "Those statutes which restricted the application of the Sherman Act against unions were intended only to shield the legitimate objectives of such organizations, not to give them a sword to use with unlimited immunity." Id. at 829.

After *Hutcheson*, union abuses of the anti-trust immunity caused Congress to outlaw the secondary boycott by Section 8(b)(4)A of the Taft-Hartley Act in 1947. In *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612 (1967), this Court concluded:

> "In effect Congress, in enacting 8(b)(4)A of the Act, returned to the regime of *Duplex Printing Co.* and *Bedford Cut Stone.*" Id. at 632.

The bare sketch of labor immunity above reveals that anti-trust activities of unions must be balanced with the policies of the NLRA which now establishes the limits of legitimate union activities. To complete the sketch, there are two separate and distinct theories of labor immunity which must be examined in detail, i.e., the conspiring or combining with non-labor interests and the legitimate union interest tests.

As shown below, the conduct of UNION herein is directly contrary to the purposes and intent of the NLRA, including the secondary boycott bans of that Act; therefore, UNION'S actions against and with CONNELL are not legal. The public policy, as stated in Section 2 of the Norris-LaGuardia Act (29 USC §102), is to promote collective bargaining and give employees full freedom of association by declaring that they shall be free from interference or restraint in the designation of their representatives. The agreement to which CONNELL has been made an unwilling party conflicts with this public policy. Also Section 20 of the Clayton Act (29 USC §52) speaks in terms of allowing labor organizations to *lawfully* carry out their *legitimate* objects. (emphasis added).

As also shown below, UNION has forfeited its immunities by conspiring and combining with CONNELL to achieve a restraint of trade outside of the limits of legitimate labor activities; therefore, nothing in the Norris-LaGuardia Act or the Clayton Act prohibits the issuance of the injunction CONNELL has sought in this case. However, even if the Court should decide that the Norris-LaGuardia Act prevents the issuance of an injunction herein, declaratory relief, holding the subject agreement violative of the Sherman Act, should be granted. It

was held in *Columbia River Packers v. Hinton*, 315 U.S. 143 (1942), that attempts of a union to interfere with the business relations of buyers and sellers of fish could not come within the definition of a labor dispute as defined in Section 13(c) of the Norris-LaGuardia Act (29 USC §113):

> "We recognize that by the terms of the statute there may be a 'labor dispute' where the disputants do not stand in the prosimate relation of employer and employee. But the statutory classification, however broad, of parties and circumstances to which a 'labor dispute' may relate does not expand the application of the Act to include controversies upon which the employer-employee relationship has no bearing." Id. at 146-147.

UNION has no labor dispute with CONNELL. It does not seek to represent a single employee of CONNELL, but only to regulate with whom CONNELL may do business, outside of any employer-employee relationship.

2. UNION Forfeited Its Anti-Trust Immunity by Conspiring and/or Combining With CONNELL to Restrain Trade.

This Court has previously held that a union forfeits any anti-trust immunities granted by Sections 6 and 20 of the Clayton Act (15 USC §17 and 29 USC §52) and Sections 1 and 4 of the Norris-LaGuardia Act (29 USC §§101 and 104) if that union conspires with an employer to lessen or restrict competition. In *Allen Bradley Co. v. Local 3, IBEW*, 325 U.S. 797 (1945), this Court held violative of the

Sherman Act a combination among a union and electrical contractors and manufacturers to lessen and restrict competition in electrical products in New York City. The simple product boycott in *Allen Bradley* pales in comparison to the boycott accomplished by the agreement herein. The agreement between CONNELL and UNION results in an effective boycott of all business enterprises which cannot, or do not for any reason, adopt UNION'S established Master Agreement. Also, the boycott is not limited to any particular construction project — it extends to all future work. Since the single subcontract in the construction industry has historically covered both products and labor, they are foreclosed from the marketplace. The boycott here, because of the way contracts are let in the construction industry, essentially extends to all the products that would be covered under any contract for mechanical work CONNELL may sign with any other employer.

Since *Allen Bradley*, this Court has repeatedly held that unions lose their anti-trust immunity if they conspire or combine with business interest to restrict competition or otherwise violate the anti-trust laws. *U.S. v. Employing Plasterers Ass'n*, 347 U.S. 186 (1954); *L.A. Meat and Provision Drivers Union v. U.S.*, 371 U.S. 94 (1962); *United Mine Workers v. Pennington*, supra. However, these cases involve unions conspiring with business interests to create a monopoly or business advantage for the non-labor parties to that particular form of conspiracy. CONNELL, admittedly, receives no benefit from the combination with UNION; however, CONNELL, together with those other general contractor parties to the subject agreement, are the vehicles by which UNION transmits its restraints of trade on all non-union mechanical and

plumbing firms within the Dallas and North Texas Construction markets. The benefactors are the "favored employers" that are parties to UNION'S Master Area Agreement.

CONNELL is both a conspirator with and victim of UNION. The form is different, but the substance is the same. A conspiracy between CONNELL and UNION exists. If there is no conspiracy, there is, at the minimum, a "combination" between them which is also violative of the Sherman Act, 15 USC §1.

The Court of Appeals failed to find a conspiracy on the grounds that CONNELL is the sole non-labor party to the agreement and is itself alleging serious injury from the agreement (Pet. App. B-23). The best answer to the Court of Appeals majority on this issue is the statement of this Court in *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965):

> "The fact that the parties to the agreement are but a single employer and the unions representing its employees does not compel immunity for the agreement. We must consider the subject matter of the agreement in the light of the national labor policy." Id. at 689.

The agreement herein goes even further, for it is outside of the employer-employee relationship. Although there has been much written on the legal meaning of the words "conspiracy" and "combination", the subject agreement reveals a violation of the Sherman Act on its face, regardless of the semantics employed. The agreement (contract) was entered into by CONNELL and UNION (conspiracy) or (combination) and it is in restraint of trade in interstate commerce, Sherman Act, 15 USC §1, outside of any collective bargaining relationship.

However, even if no conspiracy or combination should be found by this Court, the subject agreement must be examined in the light of, and balanced with, national labor policy to determine whether or not it falls within the bounds of legitimate labor interests.

3. UNION'S Conduct and the Subject Agreement Are Not Legitimate Labor Interests.

In *Jewel Tea*, supra, this Court established the "legitimate union interest" test to determine whether a union's conduct is immune from the Sherman Act. As Justice White suggests in his *Jewel Tea* opinion, the subject matter of the agreement must be considered in light of the national labor policy. The issue in *Jewel Tea* involved a restriction on market hours contained in a collective bargaining agreement. The restrictive clause was held exempt from the Sherman Act, but not because of the lack of a conspiracy or combination. Justice White, in his *Jewel Tea* opinion, balanced the anti-competitive effects of the market hours restrictions with federal labor policy and held that the clause was exempt because it was the result of collective bargaining and had a direct and intimate relation to the working conditions of employees *vis-a-vis* their own employer. Justice Goldberg, in a concurring opinion, would extend anti-trust immunity to all mandatory subjects of collective bargaining. Justice Douglas dissented, finding that, since competing employers could not agree on their own to restrict competitive practices, the addition of a labor union could not shield the agreement from the anti-trust laws.

The agreement herein would conflict with all of the opinions in *Jewel Tea*. Since CONNELL and UNION have no duty or right to bargain about employment conditions of mechanical contractors, there are no mandatory subjects of bargaining between them, muchless any basis for an agreement by CONNELL to boycott; therefore, no immunity would attach under the opinions of Justice Goldberg or Justice White.

Even if there were a bona fide collective bargaining relationship between CONNELL and UNION, the agreement would not be immune in Justice Douglas' opinion because it is an extension of the Master Area Agreement which is violative of *Pennington* and *Ramsey* on its face. As Justice Clark, of the Fifth Circuit, in his dissenting opinion, stated:

> "Thus, no matter whose blend of *Jewel Tea* is thought to be more palatable, the court there confirms that some behavior declared legitimate by the earlier Clayton and Norris-LaGuardia Acts, but proscribed by the National Labor Relations Act as subsequently amended falls without the anti-trust exemption." (Pet.App. B-53).

Therefore, even assuming the lack of a combination or conspiracy between CONNELL and UNION, the subject agreement must be accommodated and balanced with national labor policy. Besides UNION'S sole defense of the construction industry proviso to Section 8(e) of the NLRA, which is treated separately below, the subject agreement conflicts with the NLRA in many respects.

The purpose of the NLRA is to avoid industrial strife which interferes with interstate commerce and "to

prescribe the legitimate rights of both employees and employers", 29 USC §141. The findings and declaration of policy of Congress, as set forth in 29 USC §151, are to encourage the practice of collective bargaining and to protect the right of workers to choose their own representatives for collective bargaining. CONNELL has bargained with the representatives of its various classes of employees; however, the subject agreement requires CONNELL to dictate the exact terms of employment for the employees of all mechanical firms with which it does business. Section 7 of the NLRA, 29 USC §157, is the employees' Bill of Rights to self-organization, to form, join or assist labor organizations, to bargain collectively, through representatives of their own choosing, or to refrain from any or all of such activities. The subject agreement makes a mockery of these rights for employees of mechanical and plumbing firms in the Dallas and North Texas area, as well as other areas of the country where unions employ similar tactics. Section 9 of the Act, 29 USC §159, provides for the selection of labor unions by the secret ballot of employees. Section 8(b)(4)(B), 29 USC §158(b)(4)B,[4] banning secondary boycotts, ostensibly protects CONNELL and other employers from union pressures to force them to cease doing business with any other person. In *NLRB v. Denver Building Trades Council*, 341 U.S. 675, (1951), this Court recognized the objective of Congress in enacting Section 8(b)(4)(B), formerly Section 8(b)(4)(A), of the NLRA, as amended, stating as follows:

> "In the views of the Board as applied in this case we find conformity with the dual Congressional

4 Section 8(b)(4)(A) of the Taft-Hartley Act, now Section 8(b)(4)(B) of the National Labor Relations Act, as amended by the Labor Management Reporting and Disclosure Act of 1959, 29 USC §158 (b)(4)(B).

> objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." Id at 692.

This case generated annual attempts of construction unions to obtain a "common situs" picketing bill from Congress in order to overrule this Court's *Denver Building Trades* decision. Congress has consistently rejected all such attempts.[5] However, if the type of agreement herein is allowed to continue, unions can escape the decisions of this Court and the intent of Congress simply by picketing a general contractor with whom they have no dispute for a similar agreement and their actions magically become primary. The result will be a stranglehold on the entire construction industry.[6]

As far as the employees are concerned, UNION'S position is that it has the right to say to them, "The Act may say you have the right to have an election, the right to vote by secret ballot, the right to refrain from union activities, etc., but these statutory rights are really

5 Examples are H.R. 9070, H.R. 9089, H.R. 9373 and S. 2643 (86th Congress, 1960); H.R. 10027 (89th Congress, 1965); H.R. 100 (90th and 91st Congress, 1967, 1969); and H.R. 4726 (93rd Congress, 1973).

6 The questioned agreement is prevalent beyond the one between CONNELL and UNION herein. At the trial of this case, UNION produced evidence that the Los Angeles, California Building and Construction Trades Council has 9,722 similar agreements. The District Court below found in Finding of Fact No. 13, that UNION had obtained similar agreements from other general contractors in the Dallas area. Attempts of trade unions in Philadelphia to obtain a similar agreement from Altemose Construction Company resulted in approximately $300,000.00 property damage which actions are subject of a pending lawsuit, *Altemose v. Building and Construction Trades*, No. 73-773, in the United States District Court for the Eastern District of Pennsylvania. Construction trade unions have also picketed to obtain similar agreements in Florida and Ohio. See also fn. 2, supra.

meaningless because we can cut off these rights by simply bypassing you, by going for your employer's 'jugular vein' — either he signs a contract giving us full control over you and the terms and conditions of your employment, or he cannot sell and install his products and you will not get the work because we have the help of the general contractor."

The subject agreement must also be examined in connection with Sections 8(a)(5) and 8(b)(3), 29 USC §158(a)5 and (b)3, which makes it an unfair labor practice for an employer or union to refuse to bargain collectively in good faith. Even if UNION were the duly elected representative of every mechanical subcontractor with whom CONNELL desires to do business, UNION can have only one bargaining position — "sign the Master Agreement or get out of the market." Is this approach "good faith" bargaining?

Also the bans of picketing contained in Section 8(b)(7) of the Act can be escaped with ease if the proviso to §8(e) is interpreted to permit stranger unions to picket for the subject agreement. UNION can likewise make an "end run" around the clear intent of Congress that picketing shall not be allowed to obtain a pre-hire agreement, allowed, if voluntary, in the construction industry by Section 8(f) of the Act, by picketing general contractors to boycott those companies not parties to the Master Area Agreement. (I Leg. Hist. of the Labor Management Reporting and Disclosure Act of 1959, 946, and Vol. II at 1715.)

In summary, the subject agreement conflicts with the entire purpose and numerous provisions of the NLRA to

the point that it fails to meet any reasonable application of a "legitimate labor interest" test, regardless of its ultimate goal.

Whether hinged on the "conspiracy" theory, the "combination" theory, the practical effects of the agreement (contract) itself, or the "legitimate union interest theory", or all of these theories, UNION'S actions herein are not immune or exempt from the clear language of the Sherman Act unless the proviso to Section 8(e) gives the exemption or federal courts are prohibited from examining and deciding labor questions asserted by unions in defense to anti-trust allegations.

C. Federal Courts Should Adjudicate Labor Law Issues Arising in Anti-Trust Cases.

As shown in UNION'S Answer and Counterclaim (A. 21-25), its sole defense to CONNELL'S anti-trust allegations is that the construction industry proviso to Section 8(e) of the NLRA protects the subject agreement and coercive actions to obtain it. The Federal District Court ignored the anti-trust questions of this case and decided the 8(e) question in error. The Fifth Circuit majority declined to decide the 8(e) or other labor law questions of the case and considered the anti-trust issues in error, partially because of the failure to consider the labor law questions. The panel majority made a strong plea for the NLRB to decide the 8(e) question at the "next available opportunity", but that plea has been rejected by the NLRB General Counsel; therefore, the NLRB cannot

decide the 8(e) questions which are germane to this case.[7] Of course the NLRB could not decide the anti-trust issues even it it had the opportunity to do so. Only Judge Clark, in his dissenting opinion, considered the *entire* case and reached sound results (Pet. App. B-49 - B-65).

Federal courts should decide labor law questions of anti-trust cases and not relegate a party to an administrative remedy when those questions are germane, but secondary, to the anti-trust questions. CONNELL filed no charges with the NLRB herein because this case involves anti-trust violations and for the further reason that it would have been no more effective than filing them in the wastebasket. CONNELL sought instead a declaratory judgment as to the legality of the subject agreement under the anti-trust laws pursuant to 29 USC §2201. Since UNION not only relied on Section 8(e) of the NLRA as a defense, but also sought affirmative declaratory relief based on that provision of the NLRA, both anti-trust and labor issues were properly before the federal court for decision and became inextricably intertwined. Rule 57 F.R.C.P. provides: "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate". CONNELL did not even have another "adequate remedy" in view of the NLRB General Counsel's position. The allegation that various types of union activity arising in anti-trust cases are subject only to NLRB determination has been considered and rejected by this Court before in *Local 189 Amalgamated Meat Cutters v. Jewel*

7 See fn. 2 supra. The refusal of the General Counsel to issue a Complaint prevents the NLRB from deciding the labor issues and that refusal is unreviewable. *Vaca v. Sipes*, 386 U.S. 171 (1967).

Tea, supra. One of the questions considered in that case was:

> "Whether a claimed violation of the Sherman Anti-Trust Act which falls within the regulatory scope of the National Labor Relations Act is within the exclusive primary jurisdiction of the National Labor Relations Board." Id at 684.

The answer to this question was "No". This Court, in considering the question, reasoned that courts are not without experience in federal labor questions. On the question of primary jurisdiction, it was stated:

> "Secondly, the doctrine of primary jurisdiction is not a doctrine of futility; it does not require resort to an expensive and merely delaying administrative proceeding when the case must eventually be decided on a controlling legal issue wholly unrelated to determinations for the ascertainment of which the proceeding was sent to the agency." *Maritime Board v. Isbrandtsen Co.* 356 U.S. 521 (Frankfurter, Jr. dissenting).

> "Finally, we must reject the union's primary jurisdiction contention because of the absence of an available procedure for obtaining a Board determination." Id at 686.

On the same day this Court decided *Jewel Tea*, it decided *United Mine Workers v. Pennington*, supra, another anti-trust case arising in a labor law context. In the facts of this case, and other anti-trust cases involving labor questions, this Court should hold, in definite terms, that

federal courts have the power to decide, and this Court should decide, the *entire* case, including the labor law questions.[8]

II.

SECTION 8(e) OF THE NLRA DOES NOT IMMUNIZE THE SUBJECT AGREEMENT NOR UNION'S COERCIVE ACTIONS TO OBTAIN IT

In 1959 Congress enacted Section 8(e) of the NLRA, which prohibits "hot cargo" agreements or agreements between any "labor organization" and "any employer" whereby such employer agrees to cease doing business with any other "person". A proviso for the construction industry was included and it reads as follows:

> *"Provided*, that nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building structure, or other work;" (29 U.S.C.A. §158(e)).

8 Two other Circuits have recently been frustrated by the problems of primary jurisdiction concerning labor issues arising in anti-trust cases. The Third Circuit in *Int'l Ass'n of Heat and Frost Insulators v. United Contractors Ass'n, Inc.*, 483 F.2d. 384 (3rd Cir. 1973), directed the District Court to certify labor questions involved in an anti-trust case to the NLRB for answer. The NLRB, through its General Counsel, is resisting the answering of those questions. In *Carpenters' District Council v. United Contractors Ass'n of Ohio*, 484 F.2d. 119 (6th Cir. 1973), pet. for reh. pending, the Sixth Circuit also attempted to remand an anti-trust case to the District Court with directions to certify labor issues to the NLRB. The General Counsel of NLRB is also resisting the NLRB's answering those questions; therefore, at least three Circuits are currently frustrated over the question of primary jurisdiction when labor issues are involved in anti-trust cases.

The language of the above quoted proviso refers to an agreement between a labor organization and an employer. Since CONNELL has no employees who are represented by UNION, never has had any, and does not perform plumbing and mechanical work with its own employees, CONNELL is not an employer *vis-a-vis* UNION, for the purposes of the above quoted proviso. The definition of an employer contained in Section 2(2) of the NLRA [29 USC §152(2)], defines the term "employer" to include any person acting as an agent of an employer directly or indirectly. There is no evidence that CONNELL acts as the agent of its plumbing and mechanical subcontractors; on the contrary, the evidence shows that CONNELL does not have anything to do with the labor relations policies of its subcontractors and their employees. (A. 52, 68).

Section 2(5) [29 USC §152(5)] of the NLRA defines a labor organization as "an organization which exists for the purpose" in whole or in part of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work. Since CONNELL has no employees whose interests UNION could represent — and, in fact, specifically declines any interest in representing — UNION is no labor organization *vis-a-vis* CONNELL, as the proviso to 8(e) requires.

Judicial interpretation of the construction industry proviso has been twisted to the point that it is currently legal to picket to obtain subcontract agreements, but illegal to picket or use other forms of coercion to enforce them. The first time the NLRB considered the proviso, it was the unanimous opinion of the Board that picketing and other forms of coercion were not permissible for the

purposes of obtaining a "hot cargo" clause. *Colson & Stevens Construction Co.*, 137 NLRB 1650 (1962). This well reasoned decision of the NLRB was abandoned after three circuits held that picketing to obtain a subcontractor agreement was permissible,[9] and in the case of *Centlivre Village Apartments*, 148 NLRB 854 (1964), the Board held that picketing to obtain a "hot cargo" clause was permissible. The NLRB however did not pass on the validity of the particular clause in *Centlivre*, 148 NLRB at 856, fn. 11. This Court has not ruled on the reach and permissible limits of the construction industry proviso and there is no meaningful decision of the NLRB, or any court, on the application of the proviso absent a bargaining relationship.

A literal reading of the proviso could and has mislead some courts to allow coercion by a union to obtain a "hot cargo" clause in the construction industry. A literal reading has also lead some persons to believe that the proviso extends beyond the employer *vis-a-vis* his own employees; however, a literal interpretation conflicts with the very purposes of the NLRA, as well as the secondary boycott provisions of the Act. Therefore, it is necessary to examine the legislative history of Section 8(e) and the narrow construction industry proviso which reveals two clear intentions of Congress:

1. The proviso only applies to voluntary agreements;

9 *Construction Laborers Union v. NLRB*, 323 F.2d. 422 (9th Cir. 1963); *Essex County Carpenters v. NLRB*, 332 F.2d. 636 (3rd Cir. 1964); and *Orange Belt Dist Council of Painters v. NLRB*, 328 F.2d. 234 (D.C. Cir. 1964). However these cases, as well as all others involving an interpretation of the proviso, involved a collective bargaining relationship which is absent here.

2. The proviso was only intended to be applicable in a collective bargaining relationship, i.e., a union representing employees *vis-a-vis* their employer.

In examining the secondary boycott provisions of the NLRA prior to the 1959 amendments, this Court issued two landmark decisions: *NLRB v. Denver Bldg. & Const. Trades Council,* supra, and *United Brotherhood of Carpenters v. NLRB,* 357 U.S. 93 (1958), commonly referred to as the *Sand Door* case. In *Denver Bldg. Trades,* it was held that the objectives of Congress in outlawing secondary boycotts in §8(b)(4)(A), now §8(b)(4)(B), of the NLRA, applied to a common situs and were to preserve the rights of unions to bring pressure on an offending employer in primary labor disputes and of "shielding unoffending employers and others from pressures in controversies not their own." 341 U.S., at 692.

In *Sand Door,* it was held that a hot cargo clause was no defense to a union's actions in violation of the secondary boycott bans of the NLRA, but that an employer may *voluntarily* agree to a boycott. In a dissenting opinion, Justice Douglas would have permitted enforcement of the hot cargo provision because it was the product of collective bargaining, not of coercion. 357 U.S. 112. UNION obtained CONNELL'S agreement to boycott by coercion, there being no collective bargaining relationship.

During debates on §8(e), the construction industry proviso was added to allow unions the exemptions to make *voluntary* hot cargo agreements, as allowed under *Sand Door,* in a collective bargaining relationship.

The late President John F. Kennedy, then Senator Kennedy, in discussing the proviso, stated:

> "Since the [8(e)] proviso does not relate to Section 8(b)(4), strikes and picketing to enforce the contracts excepted by the proviso will continue to be illegal under Section 8(b)(4) whenever the *Sand Door* case is applicable. It is not intended to change the law with respect to the judicial enforcement of these contracts, or with respect to the *legality of a strike to obtain such a contract.*" II Leg. Hist. of the Labor Management Reporting & Disclosure Act of 1959, 1433 (emphasis added).

By enacting Section 8(e)., Congress in no manner altered the rule of the *Sand Door* case. The House Conference Report contains the following:

> "The Committee of Conference does not intend that this proviso should be construed so as to change the present state of the law with respect to the validity of this specific type of agreement relating to work to be done at the site of the construction project or to remove the limitations which the present law imposes with respect to such agreements. Picketing to enforce such contracts would be illegal under the *Sand Door* case . . . . . *The proviso is not intended to limit, change, or modify the present state of the law with respect to picketing at the site of a construction project.* Restrictions and limitations imposed upon such picketing under present law, as interpreted, for example, in the U.S. Supreme Court decision, *Denver Building Trades* case,

would remain in full force and effect. *It is not intended that the proviso change the existing law with respect to judicial enforcement of these contracts or with respect to the legality of a strike to obtain such a contract.*" 1 Leg. Hist. of the Labor Management Reporting and Disclosure Act of 1959 at 943-944 (emphasis added)

Since Congress did not intend that the proviso change the law regarding the legality of a strike or picketing to obtain a subcontractor agreement, the law prior to 1959 must be examined. The examination reveals that it was not legal to strike, picket or use coercion to obtain a hot cargo agreement. *Texas Industries, Inc., et al,* 112 NLRB 923, enf. 234 F.2d. 296 (5th Cir. 1956); *Bangor Bldg. Trades Council,* 123 NLRB 484, enf. 278 F.2d. 287 (1st Cir. 1960); *Selby-Battersby & Co.,* 125 NLRB 1179. Also, the intention of this Court prior to the 1959 amendments, as revealed in *Sand Door,* was to allow only voluntary agreements, for the Court stated:

> "A more important consideration, and one peculiarly within the cognizance of the Board because of its closeness to and familiarity with the *practicalities of the collective bargaining process,* is the possibility that the contractual provision itself may well not have been the result of choice on the employer's part free from the kind of coercion Congress had condemned. It may have been *forced* upon him by strikes that, if used to bring about a boycott when the union is engaged in a dispute with some primary employer, would clearly be prohibited by the Act. Thus, to allow the union to invoke the provision

> to justify conduct that, in the absence of such a provision, would be a violation of the statute might give it the means to transmit to the moment of boycott, through the contract, the very pressures from which Congress has determined to relieve secondary employers." 357 U.S. 106 (emphasis added).

The intention of Congress to allow only *voluntary* "hot cargo" agreements by the proviso is further revealed by the legislative history on §8(f) of the Act which allows unions and employers in the construction industry to make voluntary pre-hire agreements. In enacting §8(f), Congress gave permission for voluntary pre-hire agreements only; coercion was not to be allowed. The Senate Committee analysis reads:

> "Nothing in [8(f)] is intended ..... to authorize the use of force, coercion, strikes or picketing to compel any person to enter into such pre-hire agreements." I Leg. Hist. Labor Management Reporting and Disclosure Act of 1959, 946. (See also Colloquy between Senators Holland and Kennedy, read into the record by Congressman Barden at Vol II, 1715)

Congress obviously intended that the limiting of pre-hire agreements to voluntary ones mesh with the limiting of "hot cargo" clauses to voluntary ones, in the construction industry. This fact is further reinforced by another proviso to §8(e) enacted for the garment industry. The garment industry proviso is much broader; it exempts "hot cargo" agreements from both the bans of 8(e) and the secondary boycott bans of 8(b)(4)(B), thereby allowing coercion in obtaining the agreements in that industry.

However, the construction industry proviso simply makes §8(e) inapplicable to "an agreement" in the construction industry.

The only time this Court had the opportunity to consider the proviso was in *National Woodwork Mfrs. Ass'n v. NLRB*, supra, wherein the question was whether or not a work preservation clause violated the secondary boycott bans of the Act. In finding the particular primary clause which was the result of collective bargaining outside the scope of §8(e), exempt, this Court stated:

> "The touchstone is whether the agreement or its maintenance is addressed to the *labor relations of the contracting employer vis-a-vis his own employees.*" 386 U.S. 645 (emphasis added).

The distinction is easy to draw in CONNELL'S case. UNION'S subcontractor agreement is addressed to the labor relations of employers other than CONNELL.

In *National Woodwork Mfrs.*, supra, the general contractor, Frouge Corporation, as opposed to CONNELL in the case before this Court, was *a party to the collective bargaining agreement* containing a work perservation clause and Frouge Corporation *hired employees covered by the collective bargaining agreement.* CONNELL is neutral concerning the labor relations of its independent plumbing and mechanical subcontractors, and UNION herein has picketed CONNELL simply to satisfy its objectives elsewhere of eliminating all companies with which it does not have a collective bargaining agreement.

The *National Woodwork* and *Sand Door* opinions fully support the Congressional intent that the construction industry proviso apply only to agreements made in a collective bargaining relationship. For example, Senator McNamara, in commenting on the construction industry proviso, stated:

> "The proviso permits plumbers and pipefitters local unions to bargain with *their* contractors relative to the contracting or subcontracting out of any fabrication of the pipe . . . ." (emphasis added) II Leg. Hist. of the Labor Management Reporting and Disclosure Act of 1959, 1815.

By the words, "their contractors," Senator McNamara obviously meant plumbing and mechanical contractors who bargain with the unions representing their employees, not a contractor who has no such bargaining relationship.

In commenting on the construction and apparel industries provisions to Section 8(e), Congressman Frelinghuysen of New Jersey made the following statement:

> " 'Hot cargo'. The Landrum-Griffin Bill extended the hot cargo provisions of the Senate bill to all agreements between an employer and a labor union by which the employer agrees not to do business with another concern. The Senate insisted upon a qualification for the clothing and apparel industries and for agreements relating to work to be done at the site of a construction project. Both changes were necessary to avoid serious damage to the *pattern of collective bargaining* in these industries." (emphasis add-

ed) II Leg. Hist. of the Labor Management Reporting and Disclosure Act of 1959, 1815.

Senator Kennedy, the conference chairman, used identical language in his analysis of the conference report: "to avoid damage to the pattern of collective bargaining in [this] industry", II Leg. Hist., 1432.

The Court of Appeals requested supplemental briefs in this case as to the pattern of collective bargaining prior to the 1959 amendments. UNION was unable to show that agreements to the type herein, i.e., outside of the collective bargaining relationship, ever existed in the construction industry prior to 1959; therefore, Congress was not preserving "hot cargo" clauses outside of any bargaining relationship.

In amending Section 8(b)(4) and adding Section 8(e), Congress sought to prevent the involvement of neutral employers such as CONNELL in labor disputes not their own. The legislative history reveals that the construction industry proviso was added to allow voluntary agreements to restrict subcontracting within the employer-employee relationship. Congress only intended for construction unions to retain the same rights they enjoyed prior to the amendments.

The subject agreement, not being immunized by the proviso, falls under the ban of Section 8(e); however, even if the agreement does not fall within the ban of 8(e), the method of obtaining it runs contrary to the secondary boycott and coercive bans of 8(b)(4)A&B because UNION has picketed and coerced CONNELL to force it to refrain from doing business with other persons.

Therefore, after all balancing of the Sherman Act and the NLRA is completed, the only logical conclusion is that UNION has no anti-trust immunity herein.[10]

III.

NEITHER THE SUBJECT AGREEMENT NOR UNION'S CONDUCT IN OBTAINING IT ARE PREEMPTED FROM REGULATION UNDER STATE ANTI-TRUST LAWS

By its decision, the majority of the Court of Appeals below has given labor unions an *absolute and unlimited exemption* from all state anti-trust laws. This result was reached because the Court of Appeals ruled, in effect, that any activity which can be called or related to, even by the most strained reasoning, a labor matter is protected from state anti-trust action by the Preemption Doctrine established in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

The dangers and injustices inherent in the unlimited application of the Preemption Doctrine were recognized

10 After a diligent attempt to suggest a proper balancing conclusion to this Court, counsel for CONNELL cannot improve on the conclusion of Judge Clark in his dissent:

> "Therefore, I would hold that where a union bypasses the congressionally sanctioned methods of organizing the employer whose employees it seeks to unite (here the individual subcontractors) and illegally brings pressure on a neutral, secondary source of work for all such employers within an area (Connell) to force that unrelated economic entity to execute a contract which requires that all directly involved subcontractors bring their work forces into the membership of this local or starve for lack of work, then that union has passed beyond the scope of anti-trust immunity." (Pet. App. B-57), 483 F.2d. at 1179.

by four of the Justices of this Court in their dissenting opinion in *Amalgamted Association of Street Electric Railway and Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971). The greatest single danger is the fact that any party who believes himself injured by union action can be (and often is) denied any legal relief because of an unreviewable decision of the General Counsel of the NLRB to refuse to issue a Complaint. As stated by Justice Douglas:

> "From this it follows that if the General Counsel refuses to act, no one may act and the employee is barred from relief in either state or federal court. (Citations omitted). When we tell a sole individual that his case is 'arguably' within the jurisdiction of the Board, we in practical effect deny him any remedy." Id at 305.

The fact that application of the Preemption Doctrine in the case now before this Court could and would act to deny CONNELL any legal recourse to protect its rights, as feared by the dissenting Justices in the Lockridge case, is no longer a mere possibility, but established fact. The General Counsel's refusal to issue Complaints involving the identical agreement[11] makes it clear that no charges filed with the NLRB in a similar situation would ever be the subject of a Complaint which would be heard by the Board. Thus, the NLRB is prevented from even considering the legality of UNION'S actions and form of agreement in question here and, by the application of the Preemption Doctrine, not only to state laws, but to the jurisdiction of the federal courts, would deny any legal relief beyond the unreviewable decision of the General Counsel. It is inconceivable that this Court should, for the

11 See fn. 2, supra.

sake of the ephemeral concept of "uniformity", take away all rights to legal relief except as those rights are granted by the General Counsel. As Justice White, joined by the Chief Justice, stated in his dissent in the *Lockridge* case:

> "(C)onsiderations that justify exceptions to the rule of uniformity apply with greater force to §7 situations . . . basic concepts of fundamental fairness, regardless of their effect on the model of uniformity, counsel against any rule that so inflexibly bars a hearing."

Two other facts highlight the improper application of the Preemption Doctrine in this case. First is the simple fact that Congress never intended the enactment of labor statutes to give labor unions automatic and absolute exemption from either state or federal anti-trust laws, nor did Congress intend to remove "labor issues" from the realm of anti-trust law. The statutes enacted by Congress in this particular area, Sections 6 and 20 of the Clayton Act and Sections 1 and 4 of the Norris-LaGuardia Act, speak in terms of legal activities by unions. Further, this Court, in *Giboney v. Empire Storage and Ice Co.*, 336 U.S. 490 (1949), specifically rejected the theory that labor unions and labor related activities enjoy an inherent exemption from state or federal anti-trust regulations.

The second important factor is that Congress never gave the NLRB power or authority to consider or apply any state or federal anti-trust law. Since the Board has no power to consider, interpret, apply or grant any relief under state or federal anti-trust laws, application of the Preemption Doctrine as urged by UNION, that is, on a blanket and absolute basis, would have the effect of

granting the absolute anti-trust immunity to unions which Congress and this Court have deemed inadvisable.

Despite the refusal of the majority of the Court of Appeals to even consider any of the labor law issues inherent in this case, that majority, nevertheless, held that anti-trust laws of Texas were preempted, not by federal anti-trust laws, but *only by federal labor laws.* Such a result is in direct conflict with this Court's decisions in *Local 24, Int'l Brotherhood of Teamsters v. Oliver,* 358 U.S. 283 (1957) and *Giboney v. Empire Storage & Ice Co.,* supra, where this Court held that federal labor laws act to preempt state law only when the federal laws apply to a case and are in real conflict with the state law in question. CONNELL submits that the labor law issues must be decided before there can be even consideration, muchless application, of the Doctrine of Preemption.

Throughout this case, CONNELL has asserted that the absence of any employer-employee relationship and any collective bargaining relationship is a central issue in the determination of questions of anti-trust immunity. The significance of this issue was established by this Court very clearly in *Hanna Mining Co. v. Marine Engineers Beneficial Ass'n, Dis't 2,* 382 U.S. 181 (1965) That case involved the question of whether federal labor law applied to attempts by picketing to force recognition of a union to bargain only for supervisors and whether or not state law was thereby preempted. This Court held that, since supervisors were not employees under the federal labor laws and no other persons defined as employees were involved, the matter was outside the regime of the NLRA, and the Preemption Doctrine would not apply.

Neither of the courts below really considered the question of whether the subject agreement and activities related thereto violate or could violate the Texas anti-trust laws. Nevertheless, it is clear that the agreement is, on its face, illegal under Texas anti-trust laws as are UNION'S actions in forcing CONNELL to enter into the agreement. If the semantic exercises relied on by UNION are discarded, the true nature of UNION'S actions and the agreement are obvious. UNION, either unable or unwilling to achieve its goals by the lawful organizing methods sanctioned and established by Congress, has resorted to the illegal means of forcing out of business all construction industry employers who fail to force UNION representation on their employees. UNION is achieving its goal by conspiring or combining with other employers and implementing it by CONNELL and other general contractors, so that the general contractors give no business to any subcontractor not accepting UNION'S dictated terms.

Thus, the actions and agreement under review by this Court constitute clear and classic violations of the Texas anti-trust laws contained in Section 15.02, 15.03 and 15.04 of the Texas Business and Commerce Code, (Reproduced in the Appendix to this Brief). Violations by a union of the Texas anti-trust laws in a very similar fact situation were found in *Best Motor Lines v. Int'l Brotherhood of Teamsters, Chauffers, Warehousemen & Helpers, Local 745,* 237 S.W.2d. 589 (Tex.S.Ct. 1951). As stated by the Texas Supreme Court in *Best:*

> "The Texas Anti-Trust statutes are valid laws and all persons are subject thereto, and the courts have the power to enjoin acts and conduct in

> violation thereof. Labor unions are not excepted, even though there exists a labor dispute and the picketing is peaceful." Id at 597.
>
> "Thus, it will be seen that the very statutes which give the unions life, expressly provide that their activities must conform to the requirements of our Anti-Trust statutes." Id. at 598.

Thus, it can be seen that violations of state law are really unquestioned.

CONCLUSION

For the foregoing reasons it is respectfully requested that this Supreme Court reverse the judgment of the lower courts and hold that the subject agreement and UNION'S coercive method of obtaining it are violations of the Sherman Act and the anti-trust laws of Texas. CONNELL further requests declaratory relief that the construction industry proviso to Section 8(e) of the NLRA does not protect the subject agreement, and that the Court declare the agreement null and void together with appropriate injunctive relief restraining UNION from seeking or enforcing such agreement by any means.

Respectfully submitted,

Joseph F. Canterbury, Jr.
Counsel for Petitioner

Of Counsel:

SMITH SMITH DUNLAP & CANTERBURY

Bowen L. Florsheim
On the Brief

APPENDIX

APPENDIX

SHERMAN ACT

§1, 15 U.S.C. §1:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * * Every person who shall make any contract or engage in any combination or conspiracy [hereby] declared * * * to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

CLAYTON ACT

§6, 15 U.S.C. §17: Antitrust laws not applicable to labor organizations

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

§20, 29 U.S.C. §52: Statutory restriction of injunctive relief

No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularly in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner,

and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

National Labor Relations Act, as amended

§7, 29 U.S.C. §157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

§8(b), 29 U.S.C. §158(b) It shall be an unfair labor practice for a labor organization or its agents—

§8(b) 4, 29 U.S.C. §158(b) (4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any service ; or (ii) to threaten, coerce, or restrain any person engaged in

commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection 8(e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided;* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; * * *

§8(e), 29 U.S.C. §158(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided,* That nothing in this subsection shall apply to an agreement between a labor organization and an employer in

the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further,* That for the purpose of this subsection and subsection (b) (4) (B) of this section the terms "any employer", "any person engaged in commerce or an industry affecting commerce", and "any person" when used in relation to the terms "any other producer, processor, or manufacturer", "any other employer", or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further,* That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

NORRIS-LAGUARDIA ACT

§1, 29 U.S.C. §101: Issuance of restraining orders and injunctions; limitation; public policy

No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

§2, 29 U.S.C. §102. Public policy in labor matters declared

In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.

§4, 29 U.S.C. §104.

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor

dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title.

FEDERAL DECLARATORY JUDGMENT ACT

28 U.S.C. §2201.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Texas Business and Commerce Code:

§15.02 Trust Defined.

(a) In this section, unless the context requires a different definition, "person" does not include municipal corporation. (No source citation.)

(b) A "trust" is a combination of capital, skill, or acts by two or more persons to

(1) restrict, or tend to restrict, trade, commerce, aids to commerce, the preparation of tangible personal property for market or transportation, or the free pursuit of a lawful business; or

(2) fix, maintain, increase, or reduce the price of tangible personal property, the cost of insurance, or the cost of preparing tangible personal property for market or transportation; or

(3) prevent or lessen competition in

(A) the manufacture, transportation, sale or purchase of tangible personal property;

(B) the business of insurance;

(C) aids to commerce; or

(D) preparing tangible personal property for market or transportation, or

(4) affect, control, or establish the price of tangible personal property, or the cost of transportation, insurance, or preparing tangible personal property for market or transportation; or

(5) agree

(A) not to sell, dispose of, transport or prepare tangible personal property for market or transportation, or not to make an insurance contract, at a price below a common standard or figure;

(B) to maintain the price of tangible personal property, the charge for transportation or insurance, or the cost of preparing tangible personal property for market or transportation at a fixed or graded figure;

(C) to affect or maintain the price of tangible personal property or the cost of transportation, insurance, or preparing tangible personal property for market or transportation in order to preclude free competition between or among themselves or others in the sale or transportation of tangible personal property, in the business of transportation or insurance, or in preparing tangible personal property for market or transportation; or

(D) to pool, combine, or unite an interest they have in the sale or purchase of tangible personal property, or in the charge for transportation, insurance, or preparing tangible personal property for market or transportation, so that the price of the tangible personal property, or charge for transportation, insurance, or preparing tangible personal property for market or transportation might be in any manner affected; or

(6) regulate, fix, or limit the output of tangible personal property, or the amount of insurance undertaken, or the amount of work performed in preparing tangible personal property for market or transportation; or

(7) refrain from engaging in business, or from buying or selling tangible personal property, partially or entirely in this state.

Texas Business and Commerce Code:

§15.03 Conspiracy in Restraint of Trade Defined

(a) It is a conspiracy in restraint of trade for

(1) two or more persons engaged in buying or selling tangible personal property to agree not to buy from or sell to another person tangible personal property;

(2) two or more persons to agree to boycott, or threaten not to buy from or sell to, a person because that person buys from or sells to another person;

(3) two or more persons to agree to boycott, or not to deal with the tangible personal property of another person;

§15.03 (4) is not quoted.

Texas Business and Commerce Code

§15.04 Monopoly, Trust and Conspiracy in Restraint of Trade Prohibited; Agreement Violating Prohibition Void.

(a) Every monopoly, trust and conspiracy in restraint of trade, as defined in Sections 15.01, 15.02 and 15.03 of this code, respectively, is illegal and prohibited.

(b An agreement violating the prohibition against a monopoly, trust, or conspiracy in restraint of trade contained in Subsection (a) of this section is void and unenforceable in law or equity.